

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER ANN McALLISTER, by and through	:	CIVIL ACTION
her parents, SHERRI and PATRICK McALLISTER,;		
Guardians ad Litem, and SHERRI and PATRICK	:	
MCALLISTER, Individually	:	
v.	:	
	:	
ROYAL CARIBBEAN CRUISES, LTD, and	:	
PETER WALL	:	NO. 02-2393

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: January 20, 2005

In this action, Jennifer Ann McAllister, by and through her parents, Sherri and Patrick McAllister, and Sherri and Patrick McAllister as individuals, (collectively, “the McAllisters”), allege that Jennifer was sexually molested by Peter Wall, an employee of Royal Caribbean Cruises, Ltd., (“Royal Caribbean”) while aboard Royal Caribbean’s cruise ship.

Defendant Royal Caribbean Cruises (“RCC”) has served a subpoena upon Joan A. Feinstein, Ph.D., J.D., a psychologist and attorney who has provided mental health treatment to both Jennifer and, at separate times, to her father, to obtain all of her records for the McAllisters. Dr. Feinstein has not produced any of the requested documents or contacted RCC to make any other arrangement. RCC has now filed a motion to compel the production of the records listed in the subpoena. At the time RCC filed its motion, Dr. Feinstein had not sought a protective order. However, Plaintiffs subsequently filed such a motion on Dr. Feinstein’s behalf, asking for a partial protective order ruling that Patrick McAllister’s medical records prior to the February, 2000, Royal Caribbean cruise, not be produced. For the following reasons, I will grant RCC’s motion in part, and deny Plaintiffs’ motion.

II. Discussion

In their complaint, Plaintiffs have alleged:

The lives of JAM's parents, S and P, have also been permanently and forever changed, injured and damaged as a direct and proximate result of the aforesaid [acts] by Defendants Said damages include, but are not limited to, physical, psychological and emotional permanent and serious injuries; past, present, and future pain and suffering; loss of consortium; loss of their normal relationship with their daughter; loss of quality and enjoyment of life; past, present, and future medical/psychological counseling and pharmacological related bills; past present, and future out of pocket expenses, and past, present and future lost wages.

Complaint at ¶ 28.

Plaintiffs have asserted claims for intentional and negligent infliction of emotional distress. Complaint at Third Count and Fourth Count. Each one of these counts speaks of distress caused to Mr. and Mrs. McAllister, as well as to their daughter. Complaint at ¶¶ 42, 47.

Pennsylvania has recognized the existence of a psychotherapist-patient privilege, as, indeed, has the United States Supreme Court, in Jaffee v. Redmond, 518 U.S. 1 (1996).

However, when a party places his or her mental status at issue, such as by claiming damages resulting from emotional distress, that privilege is waived. Payne v. City of Philadelphia, Civ. A. No. 03-3919, 2004 WL 1012489 (E.D. Pa. May 5, 2004); Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131, 135 (E.D. Pa. 2001); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997). Here, it is not only Jennifer, but also her father, who has put his mental state at issue by claiming emotional distress damages.

Plaintiffs argue that Mr. McAllister's records prior to the Royal Caribbean Cruise obviously deal with concerns unrelated to the alleged molestation, and are therefore irrelevant. They maintain that, in the emotional distress claims, "Patrick McAllister is not claiming a

clinically diagnosable psychological injury He experienced normal anger one would expect if one's child had been victimized.” Memorandum in Support of Motion for A Protective Order at 2. However, this argument has been rejected in other cases.

In Thorne v. Universal Properties, Inc., Civ. A. No. 86-0333, 1987 WL 7683 (Mar. 10, 1987), the Honorable Louis J. Pollak considered a similar case, where a plaintiff who had asserted an emotional distress claim refused to disclose the name of her psychotherapist. Her counsel explained at her deposition that “the plaintiff is not claiming psychiatric or psychological illness or disability of any kind as a result of this incident which gave rise to the cause of action. She is claiming only emotional distress and mental anguish which would not rise to the level of an identifiable illness or disability.” 1987 WL at *1. She claimed, therefore, that she had not waived the therapist-patient privilege.

Judge Pollak rejected this argument. He wrote:

We are not persuaded, however, that waiver of the privilege should be made to turn on the nature of the plaintiff's evidence rather than on the nature of her claim. ... If a plaintiff seeks damages for alleged emotional or psychological injuries, the defendant's case ought not to be limited by the plaintiff's decision not to introduce available medical or psychological testimony that bears directly on the truth of the claim.

Id. at *2.

More recently, another judge in the Eastern District of Pennsylvania relied upon Thorne in rejecting the same argument. In Lanning v. SEPTA, Civ. A. Nos. 97-593 and 97-1191, 1997 WL 597593 (Sep. 17, 1997), the plaintiffs stipulated, as Mr. McAllister has done here, that they would not seek damages for psychiatric/psychological injury. 1997 WL at *1. They also stipulated that they would not offer expert testimony in support of their emotional distress claims, and would not seek any recovery for treatment of their emotional distress. Id.

The Lanning judge did not accept this argument. He pointed out that, even with the proposed stipulations, the plaintiffs would be able to establish emotional distress through their own testimony. Id. at *2. In such a case, he ruled, “Defense counsel has a right to inquire into plaintiffs’ pasts for the purpose of showing that their emotional distress was caused at least in part by events and circumstances that were [unrelated to the facts of the case].” Id.

Even more recently, a case arose which is even closer to the McAllisters’. There, as here, the plaintiff argued that his claim for emotional distress did not waive the therapist-patient privilege as it applied to treatment which predated the facts which formed the basis of his action. Payne v. City of Philadelphia, Civ. A No. 03-3919, 2004 WL 1012489, *1 (E.D. Pa. May 5, 2004). The judge quoted extensively from Lanning in rejecting this position. He concluded that “the mental health records sought by defendants are relevant as they may suggest whether plaintiff’s emotional injuries are due to circumstances prior to or a result of the incident at issue, or whether he suffered such injuries at all.” Id. at *3.

I believe that the Thorne, Lanning and Payne decisions are well-reasoned. The one case cited by Plaintiffs on this issue, Miller v. Colonial Refrigerated Transportation, Inc., 81 F.R.D. 741 (E.D. Pa. 1979), only strengthens my conclusion. There, a plaintiff who alleged posttraumatic mental illness was compelled to disclose her psychiatric records. Miller predated Jaffee by twenty years, but the Miller court decided that if there was a federal right to a therapist-patient privilege, it would not be absolute. 81 F.R.D. at 747. Instead, “the interests of the state in seeing that truth is ascertained in legal proceedings and fairness in the adversary process” would justify an exception where a claimant relied upon her mental or emotional condition as an element of her claim. 81 F.R.D. at 746-7.

In moving to quash the subpoena, Plaintiffs asks the Court to take into consideration (a) alleged discovery abuses by Defendants and the alleged misbehavior of the process server; and (b) complications in Dr. Feinstein's family life which delayed her from taking any action with respect to the subpoena. Protection of the medical records is not an appropriate remedy for either of these, and this is the only relief Plaintiffs have requested.¹ However, I will not incorporate in my Order the relatively severe penalties proposed by RCC, (such as a \$1,000 per day sanction for every day Dr. Feinstein delays producing her records) but will simply compel Dr. Feinstein to comply with the subpoena. If any further motion is necessary, I will, of course, consider sanctions.

ORDER

AND NOW, this 20th day of January, 2005, upon consideration of RCC's Motion to Compel the Subpoena of Dr. Joan A. Feinstein's Records, and Plaintiffs' Motion for a Partial Protective Order/Motion to Quash Subpoena of Dr. Joan Feinstein and Response to Defendant's Motion to Compel, it is hereby

ORDERED that Defendant RCC's Motion, docketed in this case as Document 60, is GRANTED in that Dr. Joan Feinstein shall produce all documents requested in RCC's Subpoena within ten days of the date of this Order, and that RCC's Motion is otherwise DENIED; and it is further

¹Although Plaintiff's motion discusses only the records of Patrick McAllister's treatment with Dr. Feinstein, Plaintiffs have also requested that "Defendants shall be precluded from obtaining the 'raw notes' of Dr. Feinstein in regard to Sherri McAllister and Jennifer McAllister." Proposed Order. To clarify, the reasons for my conclusion that Patrick McAllister's records are properly produced are equally applicable to the other parties in this action, since they all have asserted claims for emotional distress. Therefore, *all* of Dr. Feinstein's requested records should be produced. Plaintiffs have also asked for status/discovery conference. I will not, however, schedule one at this time, particularly in the absence of a motion which discusses the issues more fully. (As I mentioned, Plaintiffs have not asked for any relevant relief, nor have they said which "rules of ethics and procedure" Defendants violated).

ORDERED that Plaintiffs' Motion, docketed in this case as Document No. 64, is
DENIED.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE